

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW SAXON GRAHAM,

Defendant-Appellant.

UNPUBLISHED

June 22, 2006

No. 260641

Wayne Circuit Court

LC No. 04-007816-01

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(c), and armed robbery, MCL 750.529. Defendant was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of 337 months to 50 years' imprisonment. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that he was denied the effective assistance of counsel at trial. We disagree. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* Because no evidentiary hearing took place in the trial court, our review is limited to the facts on the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel [a] defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [*People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).]

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant argues that because of trial counsel's lack of preparation before trial, defendant was forced to represent himself at trial. Specifically, defendant maintains that trial counsel failed to request transcripts of taped telephone conversations that defendant had while in jail and that counsel failed to file a motion to suppress the conversations. Defendant also argues that trial counsel received the taped conversations months before trial but was unaware of the contents of the tapes.

Defendant has failed to prove that he was denied the effective assistance of counsel because a review of the record does not show that trial counsel was unprepared before trial. Defendant's first trial resulted in a mistrial because the defense was not given notice before trial that the prosecution intended to introduce into evidence taped telephone conversations that defendant had with various individuals while in jail. However, during the trial at issue, trial counsel conveyed to the court at the start of the trial that he had heard the taped conversations and was aware of the contents of the taped conversations. Counsel conveyed to the court that he was given transcripts for two of the conversations that the prosecution intended to use. After jury selection, but before the first witness was called, trial counsel argued that the taped conversations were more prejudicial than probative and that the tapes should not be admitted into evidence. When it became clear that the court would allow the conversations into evidence, defendant moved the court to let him represent himself.

Although defense counsel admitted on the record that he could not recall the specifics of one particular taped conversation that was introduced into evidence during the cross-examination of defendant, counsel's lack of familiarity with that particular conversation was not because of his lack of trial preparation. A review of the record shows that defense counsel was unsure about that particular taped conversation because the prosecution did not transcribe that conversation for the defense, even though the prosecution did so for the other taped conversations that the prosecution introduced, or intended to introduce, into evidence. For that reason, defense counsel maintained that he did not "have any independent recollection of that particular portion of the disk." Thus, we conclude that defense counsel's uncertainty regarding that particular conversation was not due to his lack of preparation; instead, it was due to the prosecution's failure to provide defense counsel with a transcript for that conversation.

Defendant also argues that trial counsel was ineffective because counsel did not know that defendant had a hearing problem. Defense counsel conveyed to the court that he was unaware that defendant had a hearing problem, and defendant has offered no evidence for this Court to conclude that defense counsel had any *reason* to be aware that defendant had a hearing problem. Moreover, defendant offers no evidence to support his underlying claim that he indeed has a hearing problem. Therefore, defendant's argument that counsel was ineffective on this ground also lacks merit.

Defendant has failed to show that counsel's lack of preparation forced him to represent himself at trial and defendant has failed to show that he was denied the effective assistance of counsel. Defendant admitted to the court that his trial counsel had listened to the taped conversations and that his counsel conveyed to him all that counsel could remember. A review of the record shows that trial counsel was familiar with the taped conversations and had transcripts of the conversations, with the exception of one particular conversation. The record also shows that counsel objected to the admission of the conversations into evidence. Under the circumstances, defendant's ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter